

M e m o r a n d u m**245.1367**

To: L. Salcedo
Return Review

April 24, 1991

From: John L. Waid
Tax Counsel

Subject: H--- and M--- K---
SR --- XX-XXXXXX

I am responding to your memorandum to me of March 19, 1991. You have requested advice as to the applicability of the "food products" exemption provided by Regulation 1602(a)(5) to the above taxpayers' sales of certain of their products.

In you letter of January 14, 1991, to the above taxpayers, you requested that they submit labels of the Diet Dutch Chocolate Drink Mix and the Food for Life Chocolate Drink Mix for review as to whether or not the products qualify as "food products" under Regulation 1602(a)(5). Mr. K---, on January 30, 1991, submitted labels for eight Food for Life products. Four of the products are drink mixes; two are soups; one – the Super Oats – is apparently a dehydrated cereal; and the last is a chocolate dessert mix. Except for the Super Oats, which supplies 160 calories, each of the products supplies the consumer 140 calories per serving. All of the labels identify the Food for Life line as "The Ultimate Weight Loss Formula", the Directions contain the following statements:

"The Food for Life Ultimate Weight Loss Formula is a delicious, nutritious, balanced, low calories food, which provided 100% of the U.S. RDA of all vitamins, minerals and protein as well as trace elements and electrolytes at levels recommended by the National Academy of Sciences for good health in only 420 calories per day.

* * *

"The Food for Life Ultimate Weight Loss Formula is designed for use as a sole source of nutrition for periods of not to exceed two consecutive weeks, unless on a physician-monitored program."

The Directions contain other admonishments about use of the products to “speed weight loss”. If the products were used as the sole source of nutrition consumed as the day’s three meals, they would supply 420 calories and 45 grams of protein.

OPINION

In interpreting and implementing the broad provisions of Section 6359(c), Regulation 1602(a)(5) sets up a two-step analysis. The threshold question is whether or not the food product under discussion is in one of the enumerated forms – liquid, powdered, granular, tablet, capsule, lozenge, or pill. If so, the next question is whether or not one of the two following conditions also occurs: (A) its label or package describes it as a food supplement, food adjunct, dietary supplement, or dietary adjunct; or (B) it is prescribed or designed to remedy specific dietary deficiencies or to increase or decrease generally the intake of vitamins, protein, minerals, or calories? If the answer to either part of the last question is “yes”, the product is excluded from the definition of “food products” with the result that its sales are subject to tax unless, of course, some other exemption applies. Additionally, we have long recognized that if the product occurs in one of the specified forms, and absent some other exemption being applicable it will be taxable if it is generally recognized to be a dietary supplement or a weight loss product, even if it is not described as such on its label and does not emphasize its vitamin, protein, mineral, or caloric content. If, however, the product, though subject to one of the criteria above, is a “complete dietary food”, supplying a daily intake of at least 900 calories, 70 grams of high quality protein, and the minimum RDA of vitamins and minerals, it is considered to be “a food product”. In that case, the sales of the product are exempt from tax.

Based on the above criteria, we conclude in the case of the specific Food for Life products at issue as follows:

(1) Soups, Super Oats. Because soups and cereals are listed in Regulation 1602(a)(1) as “food products,” we are of the opinion that they are to be considered as food products occurring in dehydrated form. Therefore, the sales of these items are exempt from tax.

(2) Drinks (including “Festive Eggnog”) and Chocolate Dessert. These are powdered products. The labels Mr. Kirkland supplied clearly state that these products are for short-term use for the purpose of weight loss. Not only do the labels designate the products as dietary adjuncts, but the products are designed for the purpose of weight loss, and also do not supply enough protein and calories to be termed a “complete dietary food”. As a result, these products are excluded from the definition of “food products” by both prongs of Regulation 1602(a)(5) resulting in their sales being subject to tax.

JLW:es
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cc: O.A. McCarty, Supervisor, Return Review